TAN CHING CHOONG & ORS

v.

EKABINA SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN ZAKARIA J
[CIVIL SUIT NO: S3-22-582-2000]
1 APRIL 2002

CIVIL PROCEDURE: *Locus standi - Suit by assignor - Rights and interest of assignor (purchaser of property) assigned to bank - Whether assignor has locus standi to sue vendor for breach of sale and purchase agreement - Whether only assignee/bank can bring action - Whether assignment absolute - Whether only a charge to secure loan - Civil Law Act 1956, s. 4(3)*

CONTRACT: *Assignment - Deed of assignment - Whether absolute - Whether by way of charge only - Rights and interest of assignor (beneficial owner of property) assigned to bank - Whether assignor can sue vendor for breach of sale and purchase agreement - Whether suit must be brought in name of assignee/bank - Civil Law Act 1956, s. 4(3)*

LAND LAW: *Charge - Deed of assignment - Whether absolute - Whether by way of charge only - Rights and interest of assignor (beneficial owner of property) assigned to bank - Whether assignor can sue vendor for breach of sale and purchase agreement - Whether suit must be brought in name of assignee/bank - Civil Law Act 1956, s. 4(3)*

BANKING: *Securities for advances - Deed of assignment - Rights and interest of assignor (purchaser of property) assigned to bank - Whether assignor has locus standi to sue vendor for breach of sale and purchase agreement - Whether only assignee/bank can bring action - Whether assignment absolute - Whether only a charge to secure loan - Civil Law Act 1956, s. 4(3)*

CIVIL LAW ACT: *Assignment - Absolute assignment not by way of charge only - Rights and interest of assignor (beneficial owner of property) assigned to bank - Whether assignor can sue vendor for breach of sale and purchase agreement - Whether suit must be brought in name of assignee/bank - Civil Law Act 1956, s. 4(3)*

The plaintiffs were purchasers of various parcels in buildings proposed to be constructed by the defendants. In order to finance their purchases, each of the plaintiffs entered into a 'loan agreement cum assignment' with a financial institution under which the plaintiffs assigned all their rights and interest under their respective sale and purchase agreements entered into with the defendants

to the said financial institutions. Subsequently, the plaintiffs sued the defendants for breach of contract. The defendants raised the preliminary issue (under O. 14A and/or O. 33 r.2 Rules of the High Court 1980) that the plaintiffs had no locus standi to maintain the suit. Hence, the question before the court was whether the assignments executed by the plaintiffs in favour of the financial institutions were absolute assignments or non-absolute assignments.

Held:

[1] Whether an assignment is one that is absolute (and not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. The terms in the deeds of assignment executed by the plaintiffs in favour of their respective financiers were in the nature of an absolute assignment. Consequently, the plaintiffs, as assignors, had no *locus standi* to sue the defendants for breach of contract. Only their financiers, as assignees, would be entitled to sue the defendants. (p 65 c, d, g-i)

[Defendants' application allowed; plaintiffs' suit dismissed.]

Case(s) referred to:

Bank of Tokyo Ltd v. Mohd Zaini Arshad (Maria Pragasam, Intervenor) [1991] 2 CLJ 989; [1991] 2 CLJ (Rep) 341 ***(foll)***

Christina Angelina William Bastian & Anor v. Newacres Sdn Bhd [1996] 2 BLJ 509 ***(foll)***

Kredin Sdn Bhd v. YTF Investment Sdn Bhd [1998] 1 CLJ 205 ***(foll)***

Max-Benefit Sdn Bhd v. Phuah Thean An & Anor [2001] 2 CLJ 70 ***(not foll)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 ***(foll)***

Thanaraj Manikam & Ors v. Lower Perak Tamil Co-operative Society [1997] 4 MLJ 82 ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Rules of the High Court 1980, O. 14A r. 1(2), O. 33 rr. 2, 5

For the plaintiffs - Harpal Singh (Harwinder Kaur & Jasvinjit Singh); M/s AJ Ariffin, Yeo & Harpal

For the 1st & 2nd defendants - Dennis Appaduray (Wong Rhen Yen); M/s Dennis Nik & Wong

For the 3rd defendant - Philip Chye; M/s Soo Thien Ming & Nashrah

Reported by Gan Peng Chiang

JUDGMENT

Arifin Zakaria J:

This is an application by the 1st and 2nd defendants for a preliminary question or issue to be tried before the trial of this action pursuant to O. 14A or O. 33 r. 2 of the Rules of the High Court 1980 ("the RHC"). The question or issue as formulated by them is whether the plaintiffs (other than the 13th, 14th and 15th plaintiffs) have the *locus standi* to commence this action based on the facts as evidenced by the pleadings before the court. The 13th, 14th and 15th plaintiffs are not involved in this application because the bank (15th plaintiff) is already joined in as a party to this action. The 1st and 2nd defendants contended this question or issue ought to be disposed of prior to the trial of this action on the ground that in the event the court were to answer the question or issue in the negative then the plaintiffs' action herein ought to be dismissed.

The facts leading to this action which are relevant to this application may briefly be stated as follows. The plaintiffs are the purchasers of various parcels in the buildings to be constructed by the 1st defendant on the land belonging to the 2nd defendant. To finance the purchase of the said parcels each of the plaintiffs had entered into a loan cum assignment agreement with the respective financial institution in which the plaintiffs assigned all their rights and interest under the sale and purchase agreement ("SPA") to the respective financial institution. This fact is pleaded in para. 3 of the amended statement of claim. The plaintiffs in their claim further alleged that the 1st and 2nd defendants had committed several breaches of the SPA and on that premise the plaintiffs pray for, *inter alia*, that the SPA be declared null and void.

The guiding principles to be followed in dealing with an application such as this is clearly stated by Kang Hwee Gee J in *Thanaraj a/l Manikam & Ors. v. Lower Perak Tamil Co-operative Society* [1997] 4 MLJ 82 at p. 88 where he said:

> Ideally, the procedure for the defendant to adopt was to plead the issue in their statement of defence under O. 18 r. 11 of the RHC 1980. He could then follow up by an application under O. 33 r. 2 and if it appears to the court that the decision on the preliminary issue substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, the court may then act under O. 33 r. 5 to dismiss the plaintiffs' action (see Supreme Court Practice 1985 18/11/1 p 276). Under O. 33 r. 2 however, the defendant need not plead the issue of law in his statement of defence and a formal application need not be made.

> It is clear to me firstly, that the issue of law raised in this instance would not require the ascertainment of any facts beyond those that appear in the pleadings and secondly that a decision on the issue if favourable to the defence would render the trial unnecessary which could only lead to much savings and costs. I therefore fail to see why the defendant should not be allowed to proceed with their application.

Similarly I find that the question posed by the 1st and 2nd defendants if decided in their favour would bring an end to this suit. This certainly would save costs and time which would otherwise be expanded to deal with other issues in the case. On that premise I therefore allowed the 1st and 2nd defendants to proceed with their application.

The material issue before me is, what is the nature of the various assignments found in the present case, is it an absolute or non-absolute assignment? The applicable test is found in the leading case of *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; ([1985] CLJ (Rep) 231). There the Federal Court at pp. 61-62 (at pp. 234-235) stated, what is now considered as the guiding test on this question, which read as follows:

> In our judgement and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.
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> Now, the assignment of February 18, 1978 appears to be in the form of a legal document signed by all the parties concerned, *viz* assignor (appellant), assignee (Public Bank) and the predecessor-in-title of the respondent. After reciting that (a) the appellant had entered into a sale agreement with the respondent's predecessor-in-title for the purchase of one unit of shop/office lot in the Merlin Tower, (b) that the Public Bank would give a loan to the appellant to enable him to pay off the balance of the purchase price, (c) that when the "strata title" of the said property was issued and registered in the name of the appellant he would execute and register a first charge of the said property in favour of the Public Bank and (d) pending the issue of the "strata title" the appellant would assign to the Public Bank all his rights title and interest in the said property and the appellant duly executed the assignment in the following terms:
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> > That in consideration of the Bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the Bank all his rights title and interest in and to the said property and under the said Sale Agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same. (See clause 1).

Clause 2 provides, *inter alia*, that the assignor shall at all times hereinafter save harmless and keep the Bank indemnified. The assignor shall be solely liable for the cost of preparing the document of assignment (see clause 3), and the assignment shall be binding upon the executors, administrators or assigns of the parties (see clause 4). In clause 5 it reads:

> This assignment shall remain in force until such time as it shall be revoked by the execution and registration thereof by the assignor of a first legal charge over the said laud in favour of the Bank.

Looking at the whole document of February 18, 1978 and bearing in mind the provision of section 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of section 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor (appellant,) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated April 1, 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in clause 1 thereof (see Fry LJ in *Confort v. Betts (supra)* at page 740). If the assignment was an absolute one (not purporting to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the Sale Agreement and the beneficial interest of the assignor in the said property under the said Sale Agreement by way of security only did not derogate from the absolute character of that assignment (*Hughes v. Pump House Hotel Co. (supra)* and *Comfort v. Betts (supra)*). We therefore agree with the judgment of the learned Judicial Commissioner but for different reason, that the appellant was not competent to maintain this action at the time when the originating summons was filed on November 17, 1982. The appeal is dismissed with costs to the respondent. The deposit of $500.00 to be paid to the respondent on account of taxed costs.

The learned counsel for the 1st and 2nd defendants submitted, and I agree with him on this, that the Federal Court in *Nouvau* had formulated the following principles as a guide in considering this question namely:

(a) whether or not an assignment is an absolute assignment (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself ie, the deed of assignment only;

(b) a deed of assignment was intended to be an absolute assignment because of the use of word "absolutely" in the deed;

(c) if the assignment is absolute, the plaintiffs are not competent to maintain the action at the time the suit was filed.

The terms of the respective deed of assignment in the present case are found in exh. "CSC2" in encl. (13).

Essentially what the deed of assignment provides is that pending the issue of the "strata titles", the plaintiffs assign to the financial institutions all their rights and interest in the said parcels. The terms of assignment as contained in the deed of assignment between the 1st and 2nd plaintiffs and Public Finance Bhd. read as follows:

> I. In consideration of the Lender having granted to the Assignor the said Loan the Assignor as beneficial owner of the said Property hereby assigns absolutely to the Lender all his rights, title and interest in and to the said Property and under the Sale and Purchase Agreement and the full benefit and advantage thereof and of all stipulation and obligations and liabilities therein contained and all remedies for enforcing the same TO HOLD the same unto the Lender for all the interest of the Assignor therein absolutely and the Assignor shall at all times hereinafter save harmless and keep the Lender indemnified against all actions proceedings damages penalties costs claims of demands and expenses which may be brought or made against or incurred by the Lender by reason or on account of the non-observance of all or any of the stipulations on the part of the Assignor contained in the Sale and Purchase Agreement which the Assignor should have performed prior to the date of the Agreement.

Similar terms of assignment are found in the deeds of assignment entered into by the other plaintiffs. The learned counsel for the plaintiffs contended that the real intention of the parties is to merely create a charge over the said parcel and not an absolute assignment. He said the assignment was made simply because of the absence of an issue document of title in respect of the said parcel. The learned counsel relied on the view expressed by KC Vohrah J in *Max-Benefit Sdn. Bhd. v. Phuah Thean An & Anor* [2001] 2 CLJ 70 in support of his contention. At p. 73 the learned judge stated:

> Although the assignment is stated to be absolute in effect it is not. The assignment was purely for the purpose of securing the loan. What I have adverted to shows that there was a loan which the assignors-purchasers had taken from the bank and that the loan had to be repaid over a period of time and that the rights and interests over the property were assigned as surety to ensure that the loan will be repaid. The loan or any balance or part of it was given 'upon the security of the same property'.
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> The implication is that the assignment of the equitable chose in action would come to an end, it would revert back to the assignors on one of the two events taking place, whichever comes earlier. The first event is where the loan is fully repaid. The second event is where the developer has obtained the legal title to the property and the property is then transferred to the assignors-purchasers with the consent of the assignee bank.

> Thus it is quite obvious that the assignment of the equitable estate in the property was conditional and was merely to secure the loan and was not an absolute assignment (see *Durham Brothers v. Robertson* [1898] 1 QB 765). The assignment to the bank was by way of charge only.

Against that we have the following cases which go contrary to the view expressed by Vohrah J namely:

> *Kredin Sdn. Bhd. v. YTF Investments Sdn. Bhd.* [1998] 1 CLJ 205 (Court of Appeal); *Bank of Tokyo Ltd. v. Mohd. Zaini bin Arshad (Maria Pragasam, Intervenor)* [1991] 2 CLJ 989; [1991] 2 CLJ (Rep) 341 and *Christina Angelina a/p William Bastian & Anor v. Newacres Sdn. Bhd.* [1996] 2 BLJ 509.

In this regard I need only refer to what was said by Shaik Daud JCA in *Kredin Sdn. Bhd.* at pp. 213-214 which reads:

> Mr. Royan for YTF finally raises another issue which merits consideration. He questions as to whether Kredin is entitled in the first place, to bring this action in its own name. He queried that since Kredin contends that the assignment was absolute and this is borne out by cl. 1 of the deed of assignment, can Kredin, then, bring this action. Under the assignment, Kredin has assigned all its rights, title and interest in the lands and the sale and purchase agreement and all remedies for enforcing the same. Accordingly, he argued that, if there is merit in Kredin's contention (which he denied), only the bank would be entitled to commence any action in relation to the sale and purchase agreement against YTF.
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> Based on the Federal Court's decision in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn.* [1985] 1 CLJ 56; [1985] (Rep) 231, it is our view that, if at all, there is a cause of action to institute the action to enforce the sale and purchase agreement against YTF, it would be the bank who would be entitled to do so, and not Kredin. Clause 1 of the deed of assignment makes this clear when together with its rights, title and interest, Kredin also assigned all remedies for enforcing to the bank.

With respect, in dealing with this issue, I am bound by the view as expressed by the Federal Court in *Nouvau*'s case which is in turn followed by the Court of Appeal in *Kredin Sdn. Bhd.*

In the net result, after having given careful consideration to the terms of assignment as found the deeds of assignment before me I find that they are in the nature of an absolute assignment. That being the case, I am of the firm view that the plaintiffs herein have no *locus standi* to institute this proceeding against the defendants.

For the above reasons I, therefore, allowed the 1st and 2nd defendants' application in encl. (14) hereof and further ordered that the plaintiffs' claim herein be dismissed pursuant to O. 14A r. 1(2) and/or O. 33 r. 5 of the RHC. The costs for this application and for this action to be awarded to the 1st and 2nd defendants.